IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 2044 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MALPATI SEVASANGH

Versus

GUJARAT STATE KHADI & VILLAGE INDUSTRIES BOARD

Appearance:

MR GT DAYANI for the Petitioner.

..... for Petitioner No. 2-25

M/S.VYAS ASSOCIATES for Respondent No. 1

..... for Respondent No. 2-24

Mr.U.R. Bhatt, Assistant GOVERNMENT PLEADER, for Respondent No. 25

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 15/04/2004

ORAL JUDGEMENT

1. Whether the Court is bound to accept the Award of

the Arbitrators in a pending suit, in which the parties, inter se, outside the Court, independently and without the aid of the Court, decided to refer the dispute to Arbitrators and what is the effect of such Award if one of the parties is not willing to accept the same as a compromise under Rule 23 Rule 3 of the Code of Civil Procedure, is the question which is required to be decided by this Court in the present revision application.

2. Respondent No.1, Gujarat State Khadi & Village Industries Board, is the original plaintiff of Summary Civil Suit No.191 of 1983, which is pending in the City Civil Court at Ahmedabad. The said suit is filed for recovery of certain amount and the present applicants are defendant Nos. 1 and 2 in the said suit. The said suit has been filed by the plaintiff to recover Rs.2,78,54,408.47 Ps., along with the interest thereon. In this revision, we are not concerned with the merits of the aforesaid suit in any manner. During the pendency of the said suit, the parties to the suit, on their own volition, decided to refer the said dispute to two Arbitrators. Accordingly, the parties, without the intervention of the Court, decided to approach the Arbitrators in connection with the dispute in question. It is required to be clarified that the parties went to the Arbitrators in a pending suit, which is filed by the plaintiff to recover the aforesaid amount, and, it seems that the Arbitrators gave their Award on 10.12.1994. By the said Award, the Arbitrators recommended that the State Government may pay some grant to the defendants and the plaintiff-Board shall withdraw all civil and criminal cases which are filed by the plaintiff against defendant No.1-Sevasangh. The plaintiff-Board, subsequently, passed a Resolution, in its meeting on 28.1.1985, showing the willingness to accept, both the interim Award as well as the final Award. The Resolution of the Board is produced at pages 45 and 46 in the compilation. Since the suit of the plaintiff is already pending for final disposal, on behalf of the petitioners-original defendants 1 and 2, an application was submitted before the trial court at Exhibit 222. The said application is also produced along with the documents, annexed with the revision memo, in the compilation. The said application was given by the defendants by resorting to the provisions of Order 23 Rule 3 of the Code of Civil Procedure. In the said application, it is averred by the defendants that the plaintiff and the defendants agreed on 11.2.1994 to refer the subject matter to the Arbitrators and that the subject matter of the suit, along with the other subject matters, were referred to

the Arbitrators for their decision and under the circumstances, the claim of the plaintiff in the suit stands fully adjusted in terms of the Award / Compromise as per the Award of the Arbitrators dated 10.12.1994 and as per the same, the plaintiff should withdraw the said suit in terms of the said Award. It is also stated in Exhibit 222 that since the plaintiff has not withdrawn the suit, the defendants are filing application under Order 23 Rule 3 of the Code of Civil Procedure, with a request that the court may accordingly pass a decree and it is also requested that the suit claim be treated as satisfied in terms of the Compromise / Award dated 10.12.1994 and to pass a decree accordingly.

3. The application was resisted by the original plaintiff on various grounds. By its reply at Exhibit 229, the plaintiff-Board contended that the application of the defendants does not satisfy the requirements of Order 23 Rule 3 of the Code of Civil Procedure and, therefore, such application was not maintainable. It is also the case of the plaintiff that the alleged agreement regarding referring the dispute to the Arbitrators is dated 11.2.1994, but in view of the provisions of Chapter IV of the Arbitration Act, 1940, in a pending suit, the reference can be made only in accordance with the provisions of the said Chapter. It is also averred that the Arbitrators have not followed the procedure, as required under the Arbitration Act. It is also averred that the Award was not published within a period of four months from the date of entering into the reference. It is also the say of the plaintiff that no stay was granted under Section 34 of the Arbitration Act. It is stated by the plaintiff in its reply that both the Arbitrators, one Zinabhai Darji as well as one Arvindbhai Buch, both were Trustees of defendant No.1-Trust and on that ground, the Award is vitiated. It is also the say of the plaintiff that the Arbitrators should have functioned in a quasi-judicial manner and that, their enquiry should not have been a slipshod one. The Arbitrators had not even heard the matter in an appropriate manner.

4. The learned trial Judge, after hearing both the sides, at length, rejected the said application of the defendants at Exhibit 222, and, accordingly, the trial court has decided not to accept the said Award on record for the purpose of passing a decree under Order 23 Rule 3 of the Code of Civil Procedure. It is the aforesaid order, which is impugned in the present revision application at the instance of the original defendants.

5. The trial court, while deciding the said

application, came to the conclusion that since the compromise is not signed by both the parties, the same cannot be accepted. The trial court also came to the conclusion that, in the instant case, the defendants have not prayed before the Court that though the time has not been extended by the parties, the parties willingly took part in the arbitration proceedings without any demur and that this is a fit case for extension of time. The trial court has also found that as per the requirements of Order 23 Rule 3 of the Code of Civil Procedure, before recording the satisfaction, the signature of the plaintiff is a must in view of the provisions of the Code of Civil Procedure. Under the circumstances, the application of the defendants at Exhibit 222 for passing a decree under Order 23 Rule 3 of the Code of Civil Procedure is rejected by the City Civil Court. It is the aforesaid order, which is impugned at the instance of the original defendants in the present revision application.

6. Mr.Dayani, who is appearing for the original defendants in the suit, submitted that, since both the sides had agreed to refer the dispute to the Arbitrators, and since it is an Award given by the arbitrators, the trial court should have accepted the same by considering the said Award as an agreement / compromise in the suit and should have passed a decree accordingly. It is also argued by Mr.Dayani that since the original agreement for referring the dispute is signed by the parties, it is not necessary that, even at the time of presenting the said Award before the Court for the purpose of recording the agreement / compromise, such application is also required to be signed by the partes, as, according to Mr.Dayani, it is enough if it is proved that the original agrement was referred with the consent of both the sides and what is required is the signature at the initial stage of referring the dispute. Mr.Dayani also submitted that the plaintiff-Board itself, by its conduct, accepted the said Award, both interim and final Award, as, a Resolution was passed. Under the circumstances, now it is not open for the plaintiff-Board to back out from the said stand and to contest the suit on merits, again. It is also submitted by Mr.Dayani that, in any case, the trial court should have come to the conclusion that the claim of the plaintiff is satisfied in view of the Award of the Arbitrators and that appropriate order should have been passed in the main suit, by accepting such an agreement / compromise, which should be treated as an adjustment of the claim or satisfaction of the claim of the plaintiff. Mr.Dayani further submitted that appropriate order should have been passed by the Court by treating the said Award as an adjustment of the claim of the plaintiff by

resorting to Order 23 Rule 3 of the Code of Civil Procedure read with Section 47 of the Arbitration Act, 1940. Mr.Dayani submitted that the trial court has committed an error of jurisdiction in not passing an appropriate order by recording the compromise, as contemplated by Order 23 Rule 3 of the Code of Civil Procedure.

7. Mr.D.D. Vyas, learned Advocate appearing for the original plaintiff-respondent No.1, on the other hand, submitted that, in a pending suit, the parties decided to go to Arbitrators on their own volition and without intervention of the Court in any manner. It is submitted by him that even the Arbitrators have not followed the procedure prescribed by the Act and has not given the Award within the stipulated time. It is submitted by Mr.Vyas that in a pending suit, if the parties, on their own volition, decide to refer the dispute to the Arbitrators, such Award cannot be pressed into service for recording as a compromise of the suit unless the parties agree to accept such Award as a compromise of the suit. He submitted that the Arbitrators have not decided any claim of the plaintiff and the claim of the plaintiff is not dealt with, in any manner, in the Award. He submitted that, looking to the nature of the procedure adopted, the plaintiff-Board is not willing to accept the same as a compromise between the parties and the plaintiff is not willing to accept the said Award. Mr.Vyas submitted that simply because the Board might have passed some Resolution subsequently to accept the Award itself is no ground, by which the plaintiff can be compelled to enter into a compromise, as contemplated by Order 23 Rule 3 of the Code of Civil Procedure. Mr.Vyas submitted that since the parties have referred the matter to the Arbitrators in a pending suit, without the intervention of the Court, such Award is not enforceable under Order 23 Rule 3 of the Code of Civil Procedure and the Court is not bound to pass a decree on the basis of such Award unless both the plaintiff and the defendants are agreeable for passing such an order, treating the said Award as a compromise.

Both the sides have also cited various judgments in connection with the Award given by the Arbitrator in a pending suit without the intervention of the Court.

8. The principal question which requires consideration in this revision is whether the Court is bound to pass a decree, as contemplated by Order 23 Rule 3 of the Code of Civil Procedure on the basis of such

Award, if one of the parties is not willing to abide by the said Award of the Arbitrators.

9. Considering the arguments of both the sides, it is, as such, not in dispute that, in a pending suit, the parties have decided to refer the dispute to Arbitrators without intervention of the Court in any manner. Under the circumstances, such Award is required to be treated as an Award as provided in the proviso to Section 47 of the Arbitration Act. It is not in dispute that so far as the Award of the Arbitrators is concerned, the same is governed by the Arbitration Act, 1940. The effect of such Award is, therefore, required to be examined in the light of the provisions of Section 47 of the Arbitration Act, 1940. Section 47 of the Arbitration Act, 1940 provides as under :-

" ... ...

47. Act to apply to all arbitrations.-Subject to the provisions of Sec.46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder :

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.

... ..."

(emphasis supplied)

Since the defendants have preferred the application at Exhibit 222 for the purpose of recording compromise, as provided by Order 23 Rule 3 of the Code of Civil Procedure, reference is also required to be made to Order 23 Rule 3 of CPC, which provides as under ;-

" ... ...

ORDER XXIII

WITHDRAWAL AND ADJUSTMENT OF SUITS

XXX XXX XXX

3. Compromise of suit.-Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit.

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation.-An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872) shall not be deemed to be lawful within the meaning of this rule.

... ..."

10. Mr.Dayani submitted that the said application, therefore, may be treated as an application given as per the proviso to Section 47 of the Arbitration Act, 1940 read with Order 23 Rule of CPC. It is submitted by Mr.Dayani that since it is an Award given by the Arbitrators, it should be treated differently from the ordinary consent terms submitted by the parties and such Award is, therefore, required to be treated separately as it is an Award given by expert Arbitrators and their Award should be treated in the nature of a verdict given in a quasi-judicial proceedings. It is, therefore, submitted that it is not necessary that while presenting the Award, the party must disclose before the Court that both the sides are willing to abide by the Award of the Arbitrators and the same may be treated as a compromise in the suit. It is submitted by Mr.Dayani that simply because the plaintiff has not signed the consent terms, as provided by Order 23 Rule 3 of the CPC for the purpose of accepting the said Award, the Court can still pass a decree on the basis of such Award, and especially when

the plaintiff has affixed the signature at the time of reference to Arbitrators, it is not necessary that, again, such signature should be there before recording the Award as adjustment / compromise.

To substantiate his say on this point, Mr.Dayani has relied on the decision in Malek Bavaji Amarkhan v. Bai Sonabai and ors, XIX GLR 482. So far as the aforesaid case is concerned, the same is prior to the amendment of the Code of Civil Procedure in connection with Order 23 Rule 3 of CPC. The words "... in writing and signed by the parties ...." are inserted by Section 74 of Act 104 of 1976, which has come into effect from 1.2.1977. In the said decision, this Court has considered the effect of the Award of an Arbitrator, wherein the parties have referred a dispute or difference to an Arbitrator without an order of the Court. Dealing with the said question, it has been observed by the learned Judge in paragraphs 2 and 3 as under :-

" ... ...

2. It is settled position of law that where in a suit the parties have referred their difference to the arbitration without an order of the Court and an award is made, a decree in terms of the award can be passed by the Court under Order 23 Rule 3 of the Civil Procedure Code (Vide : Chambasappa Gurushantappa Hiremath v. Basadingayya Gokarmaya Hiremath (1927) 51 I.L.R. 903 and Modi Narandas Chhaganlal v. Jamnadas Maneklal and Another, (1969) 10 Guj. L.R. 210) Mr.Shah, learned Advocate for respondents Nos. 1(b) to 1(h) does not dispute this proposition of law. Mr.Shah has, however, tried to support the judgment of the learned District Judge on the ground that under proviso to sec.47 of the Arbitration Act the Court can accept the compromise only if the consent is given by the parties at the time when the Court is called upon to consider whether the award should be accepted as an adjustment or a compromise. He also supported the view of the learned District Judge that inasmuch as no permission was granted to Ajubai to sign this award as alleged by the plaintiff, the agreement, if at all there was any, is voidable as prescribed under Order 32 Rule 7(2) of the Civil Procedure Code, and since Ajubai avoided the agreement, the trial court was justified in dismissing the application of the petitioner herein, who was the original plaintiff.

3. I am afraid that none of the contentions of Mr.Shah can sustain the order of the learned District Judge. It is no doubt true that V.R. Shah, J. who decided the case of Modi Narandas v. Jamnadas (supra) observed in paragraph 8 in his decision that the language of the proviso to sec. 47 of the Act is very clear and the consent should be given by the parties at the time when the Court is called upon to consider whether the award should be accepted as an adjustment or a compromise. V.R. Shah, J. however, refrained from entering into any detailed discussion of this question because in his opinion it is not necessary to consider the interpretation of the language of the proviso to sec. 47 as it did not apply to the facts of that case. Except this observation of the leanred Single Judge, I do not think that Mr.Shah can make this proposition good in view of the line of decisions of the Bombay High Court. The jurisdiction to record an adjustment, though not agreed to by the other party, is not taken away (vide : Ruttonsey Lalji v. Pooribai, I.L.R. 7 Bom. 304 and The Coculdas Gulabdas's Manufacturing Company v. James Scott, (1892) I.L.R. 16, Bom. 204). This Bombay view is incorporated in Rule 3 of Order 23 of the Civil Procedure Code. Rule 3 provides as under :-

"3. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit."

The rule does not confer any discretion on the Court and when it is established that a suit has been adjusted either wholly or in the part by a compromise, it is the duty of the court to record it and pass a decree in accordance therewith save and except in the cases where such recording would result in substantial failure of justice. The Andhra Pradesh High Court has also taken the same view and a Division Bench consisting of S. Obul Reddi and Venkitarama Sastry, JJ. held in The Andhra Mennonite Self Supporting Church Society v. Sundramma and Others, A.I.R. 1973

A.P. 19 that the consent under proviso to sec. 47 of Arbitration Act means consent to the reference and also to the award and no further consent to the terms of the Award at the time of recording the compromise under Order 23 Rule 2 is necessary. The Division Bench, speaking through Venkatrama J., observed in paragraph 8 as under :

"Now the only question is whether the consent to the award should be regarded as a consent given to the compromise itself or whether there should also be a consent to the terms at the time when the Court takes up for consideration the application under Order 23 Rule 3 C.P.C. on the question. We are bound by the Full Bench decision of the Madras High Court in Abdul Rahman v. Muhammad Siddiq, A.I.R. 1953 Madras 781 (FB) in which it was decided as follows :-

"We are accordingly of opinion that under the proviso to Sec. 47, an arbitration award obtained otherwise that in proceedings taken in accordance with the Act cannot without more be recognised as a compromise or adjustment of the suit; that no decree can be passed thereon under the provisions of Order 23 Rule 3; and that the decision in Aruuga Mudaliar v. Balasubramania Mudaliar, A.I.R. 1945 Mad. 294 should be overruled. But if after an award is made the parties thereto agree to accept it, that will be a compromise and a decree passed thereon could be passed under Order 23 Rule 3."

... ..."

The learned Judge, therefore, came to the conclusion that where, in a suit, the parties have referred the dispute to the Arbitrator without an order of the Court, a decree in terms of the Award can be passed under Order 23 Rule 3 of the Code of Civil Procedure. The Court has also further observed in paragraph 5 that while recording the compromise, the Court has to record a finding on the question whether there was or was not any lawful agreement to compromise or adjust the suit.

At this stage, reference is also required to be made to the decision of this Court in Modi Narandas Chhaganlal v. Jamnadas Maneklal & another, X GLR 210.

While examining the scope of the provisions of Order 23 Rule 3 in connection with the acceptance of an Award by the parties, it has been held by this Court as under in paragraph 6 :-

" ... ...

6. In the instant case the parties have accepted the award after it was given. It is necessary to consider as to what is the effect of the acceptance of such an award by all the parties to the suit. Does it remain an award even after all the parties to the suit accepted it ? In my opinion, it does not remain as award as such, that is, it does not remain a decision of an arbitrator. By reason of the fact that all the parties to the suit have accepted it, the award becomes, as it were, an agreement between the parties or an adjustment of the suit arrived at by all the parties. Order 23, Rule 3 of the Civil Procedure Code gives unlimited latitude to the parties to a suit to settle the dispute between them in any manner they like and they can always put that settlement of dispute before the Court and request the Court to make a decree in terms of that settlement. All that the Court has to do in such a case is to see whether the settlement or the compromise is lawful one or not. If it is a lawful compromise or settlement, the Court is bound to pass a decree in terms of the satisfaction to the extent that it settles the dispute between the parties. The Court is not required to enter upon any enquiry as to what were the means adopted by the parties to arrive at such an agreement or compromise; or who persuaded the parties to enter into such a compromise or adjustment or what were the matters considered by the parties in arriving at such a settlement or compromise. The parties may arrive at a settlement or compromise by the instrumentality of a third person; or they may arrive at such a settlement or compromise on accepting the advice of some persons. When an award is accepted by the parties to a suit all that they do is to make the award an instrument to enable them to come to an agreement or

adjustment of the suit. Once the parties have accepted the award, the award ceases to be a decision of a third person and it assumes the character of an agreement arrived at by the parties to the suit. When, therefore, after accepting the award any party goes to the Court and states to it that the parties have accepted the award and, therefore it should be accepted as a compromise or adjustment of the suit, what is put before the Court is that there has been an agreement between the parties to the suit and it should be acted upon. When the other side appears in the Court and says that there has been no such agreement, the Court is entitled to enter into an inquiry as to whether there was an agreement in fact or not, and if the Court is satisfied, despite the objection raised by the other side that there was in fact an agreement or settlement of the dispute between the parties, the provisions of Order 23, Rule 3 authorise the Court to arrive at such a decision and to pass a decree on the basis of that decision. In the instant case, when the defendants told the Court that the parties including the plaintiff have accepted the Award, what the defendants intimated in fact to the Court was that the suit is settled or adjusted in a particular manner as expressed in the award made by the arbitrator, and the defendants asked the court to record that agreement or settlement of the dispute and to pass a decree in accordance with the said award. The Court, therefore, when it recorded a finding that the plaintiff had accepted the award, did in fact record a finding that the agreement alleged by the defendants is proved. In the instant case, therefore, in my opinion, the proviso to sec.47 of the Act does not at all come into play and it is, therefore, not necessary to consider the rulings cited on behalf of the appellant in support of the contention as to whether the consent necessary under the proviso to sec. 47 is given or not.

... ..."

It has also been observed as under in paragraph 8 of the said decision :-

" ... ...

8. It is true as contended by Mr.Patel that if the case were to be decided on the basis of the

> proviso to sec. 47 of the Act, the consent should be given at the time when the Court is called upon to consider whether the award should be accepted as an adjustment or a compromise. The language of the proviso to sec. 47 of the Act is, in my opinion, very clear and leads to this interpretation only. However, I refrain from entering into any detailed discussion of this question because in my opinion, as I stated earlier, it is not necessary to consider the interpretation of the language of the proviso to sec. 47 because that proviso does not apply to the facts of the case. The rulings relied upon by Mr.Patel and particularly the cases in Zeauddin and others v. Abdur Rafique A.I.R. 1952 Patna 66, Jagaidar Damdoar & Co. v. Purshottam Umedbhai & Co., A.I.R. 1953 Calcutta 690 and Phool Narain v. Madan Gopal A.I.R. 1955 Rajasthan 162, which lay down that the consent necessary under the proviso to sec. 47 of the Act must be a consent given before the Court and not earlier, do not deal with a case where the parties to the suit had accepted the award prior to the matter being agitated in the Court. The question, therefore, as to what would be the effect of the parties accepting the award after it is made did not arise in those cases and those cases are, therefore, not helpful to me in the decision of this case.
>
> ... ..."

In the aforesaid case, therefore, the Court found that the parties have accepted the Award of the Arbitrators. The Court has specifically found that moment the party accepts the Award, it becomes an agreement between the parties or an adjustment of the suit arrived at by the parties as per the provisions of Order 23 Rule 3 of the CPC and, therefore, it should be treated as a settlement or compromise of the dispute by acceptance of such Award by the parties.

11. At this stage, reference is also required to be made to the judgment of the Apex Court in Naraindas v. Vallabhdas and others, AIR 1972 SC 1. It has been found by the Apex Court in paragraph 7 of the said judgment that it is always open to parties to refer a dispute to arbitration without the intervention of the Court. In case a suit is pending in respect of the subject matter of the dispute, there can be no valid reference during the pendency of the suit, to arbitration, without the order of the Court. It has also been held that the

underlying reason for that is to avoid conflict of jurisdiction by both the Court and the Arbitrators dealing concurrently with the dispute. An Award given on a reference during the pendency of a suit relating to a dispute, which is the subject matter of the suit, without obtaining the order of the Court, cannot be enforced. The only exception to the rule is provided by the proviso to Section 47 of the Arbitration Act (Act 10 of 1940) according to which "an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any court before which the suit is pending". In such an event, the Award is enforced as a compromise or adjustment of the suit because all the interested parties have given their consent to the Award.

Paragraph 7 of the aforesaid judgment (AIR 1972 SC 1) reads as under :-

" ... ...

7. It is next argued by Mr. Anand that as the reference to arbitrators was made out of Court and as all the parties to the arbitration agreement did not sign the award in token of their acceptance, the same could not be made a rule of the Court. There is no substance, in our opinion, in the above contention. It is always open to parties to refer a dispute to arbitration without the intervention of the Court. In case, a suit is pending in respect of the subject matter of the dispute, there can be no valid reference during the pendency of the suit, to arbitration without the order of the Court. The underlying reason for that is to avoid conflict of jurisdiction by both the Court and the arbitrator dealing concurrently with the same dispute. An award given or a reference during the pendency of a suit relating to dispute which is the subject matter of reference without obtaining the order of the Court cannot be enforced. The only exception to this rule is provided by the proviso to section 47 of the Arbitration Act (Act 10 of 1940) according to which "an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending". In such an event, the award is enforced as a compromise or adjustment of the suit because all the interested

parties give their consent to the award. Where, however, as in the present case, no suit is pending with respect to the subject matter of dispute and the parties choose to refer a dispute to arbitrators, it is not essential that the parties should signify their consent to the award before the same can be enforced. Any other view would run counter to the entire scheme and object of arbitration for the settlement of disputes according to which, agreement and consent are imperative only at the stage of referring the dispute to arbitrators but not at the stage of the award. The decision of Bachawat, J. (as he then was) in Jugaldas Demodar Modi & Co. v. Pursottam Umedbhai & Co. relied upon by the appellant has no bearing as the said case dealt with an arbitration reference during the pendency of a suit.

... ..."

(emphasis supplied)

In my view, considering the aforesaid judgment of the Honourable Supreme Court, and considering the provisions of Section 47 of the Arbitration Act, 1940, especially as per the proviso to Section 47 of the Act, such Award can, at the most, be pressed into service in a pending suit only for the purpose of recording the settlement or compromise, as, such Award, on its own, is not enforceable in any manner. Considering the scheme of Section 47 proviso as well as considering the provisions of Order 23 Rule 3 of the Code of Civil Procedure, such Award can only be treated as a compromise between the parties and the same can be presented before the Court for the purpose of recording the compromise or adjustment of the suit, and not beyond that. It is not in dispute that the plaintiff has, ultimately, taken a stand, by which the plaintiff has not agreed to treat the said Award as a compromise or adjustment of the dispute.

A compromise is required to be taken into consideration provided both the sides are agreeable to abide by the said terms and not otherwise. A compromise cannot be a one sided compromise, as both the sides to the dispute should agree for such compromise.

Black's Law Dictionary defines "compromise and settlement" as under :-

" ... ...

Compromise and settlement. Settlement of a disputed claim by mutual concession to avoid a lawsuit.

xxx xxx xxx

An arrangement arrived at, either in court or out of court, for settling a dispute upon what appears to the parties to be equitable terms, having regard to the uncertainty they are in regarding the facts or the law and the facts together. An agreement or arrangement by which, in consideration of mutual concessions, a controversy is terminated.

xxx xxx xxx

See Alternative dispute resolution; Arbitration; Mediation; Settlement.

... ..."

(emphasis supplied)

The Concise Law Dictionary by P. Ramanatha Aiyar (1977 Edition), emphatically defines 'compromise' as under :-

" ... ...

Compromise. To adjust by mutual concession; to settle without resort to the law; to compound. (As noun) An "adjustment of matters in dispute by mutual concessions."

xxx xxx xxx

" An agreement between two or more persons, who, to avoid a law suit, amicably settle their differences, on such terms as they can agree upon."

xxx xxx xxx

The arrangement of a dispute by concessions on both sides; an adjustment between the parties to a dispute ending in a settlement; a joint promise or agreement made by contending parties to abide

by the terms and conditions agreed.

xxx xxx xxxx

... ..."

In the aforesaid Concise Law Dictionary, the learned Author defines 'compromise' in relation to Order 23 Rule 3 of the Code of Civil Procedure as under :-

" ... ...

A compromise is always bilateral and means a mutual adjustment. A compromise means agreement or adjustment for the settlement of a controversy by mutual concessions, often involving partial surrender.

... ..."

(emphasis supplied)

In the instant case, the petitioners submitted application Exhibit 222, with a request that the suit claim be treated as satisfied in terms of the Compromise and the trial court may pass a decree accordingly. The said application was resisted by the original plaintiff by filing reply Exhibit 229.

It goes without saying that the expression `compromise' necessarily involves the concept of mutual concessions and consensus. When the original plaintiff resisted the application Exhibit 222, by filing Exhibit 229, the plaintiff was, in terms, opposing the move on the part of the petitioners-original defendants and, therefore, in this case, the element of 'compromise' is lacking, in terms.

It is, no doubt, true that the Award of the Arbitrators is in the picture. However, unless it is agreed by both the sides to abide by the said Award, the said Award cannot be taken as a compromise in a pending suit. Apart from the provisions of Order 23 Rule 3, which clearly provide that such compromise should be signed by the parties, even otherwise, as per the proviso to Section 47 of the Arbitration Act, such Award, which is otherwise obtained may with the consent of all the

parties interested be taken into consideration as a compromise or adjustment of a suit by any court before which the suit is pending. If one of the parties to a suit is not agreeable to such consent for accepting such Award for the purpose of settling the dispute pending in the suit, the Court has no option but to proceed with the suit on its own merits. Accordingly, the Court has no option but to proceed with the suit on its own merits. Accordingly, in a case, where an Award of the Arbitrators is given in a pending suit and without the intervention of the Court, the Court can pass a decree on consent of the parties if the parties are ultimately willing to abide by the Award of the Arbitrators by treating it as a compromise between the said parties to a pending suit. There is a difference between an Award of an Arbitrator in a pending suit, which is given without the intervention of the Court in any manner and an Award of an Arbitrator, which is given without there being any pending suit. Both would, therefore, be governed in a different manner. In my view, the trial Judge was, therefore, absolutely justified in not recording the compromise / adjustment of the suit solely on the basis of the Award of the Arbitrators especially when the plaintiff is not willing to accept the same for the purpose of settling the claim of the plaintiff or if the plaintiff is not willing to enter into compromise on the basis of such Award of the Arbitrators. The Award of an Arbitrator, in such a case, can only be treated as a compromise, and unless both the sides are willing to abide by the said compromise, it is not open for the Court to pass any decree only on the basis of the request of one of the parties to the suit. As pointed out earlier, a compromise of the dispute requires willingness of both the sides and cannot be willingness of one side, and such willingness can be ascertained, if, ultimately, both the sides agree to sign the consent terms. This position is also very clear in view of Order 23 Rule 3 of CPC, by which it is clearly provided that it should be proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise (in writing and signed by the parties). Now, when the plaintiff is not willing to sign the said consent terms, the Court has no alternative but to proceed with the suit on its own merits, ignoring the so-called settlement or compromise of the suit. Even apart from the said provision of Order 23 Rule 3, even proviso to Section 47 of the Arbitration Act, 1940 itself provides that such Award of the Arbitrators can be taken into consideration for the purpose of adjustment of the suit or as a compromise of the suit, with the consent of all the parties. If all the parties are not giving

consent for accepting such Award, naturally, the same cannot be treated as a compromise or adjustment of a suit pending before the Court. Such Award, therefore, which is given by an Arbitrator in a pending suit can only be pressed into service as an adjustment or compromise of a suit and the effect of such Award would be nothing but a document of compromise or adjustment of a suit and not beyond that. Under the circumstances, the Court is not bound to pass a decree solely on the basis of the Award of such Arbitrators, simply because, initially, the party might have agreed to go to arbitrators by consent. In my view, considering the proviso to Section 47 of the Arbitration Act, 1940 as well as Order 23 rule 3 of the Code of Civil Procedure, such Award can be treated as a compromise or adjustment. Even at the time of presenting such compromise, the parties should have shown their willingness to abide by the same.

12. Mr.Dayani, learned Advocate for the petitioners, has cited certain judgments of other High Courts. However, in my view, considering the judgment of the Apex court in Naraindas v. Vallabhdas and others, AIR 1972 SC 1 (supra), and considering the provisions of Section 47 of the Arbitration Act, 1940. and Order 23 Rule 3 of the Code of Civil Procedure, no view, other than the one taken by the trial court, is possible, by which the trial court has found that unless the plaintiff is willing to sign the said compromise, the Court cannot accept the same for the purpose of recording the satisfaction of compromise as provided under Order 23 Rule 3 of the Code of Civil Procedure. So far as proviso to Section 47 of the Arbitration Act, 1940 is concerned, it deals only with the compromise or adjustment of the suit and the said provision does not deal with the satisfaction of the claim of the plaintiff. So, while considering the application of the defendants for the purpose of recording the compromise, the Court is required to consider the proviso to Section 47 of the Arbitration Act, 1940, which deals with two things, (i) compromise; or (ii) adjustment. In a pending suit, if the party chooses to go before the Arbitrators, without the help of the Court, such Award can never be said to be an enforceable Award, as discussed earlier, as per the provisions of the Arbitration Act, 1940, but is required to be given limited effect of recording the compromise as provided in the provision of Order 23 Rule 3 of CPC as well as the proviso to Section 47 of the Arbitration Act, 1940.

At this stage, reference is also required to be made to the judgment of the Apex Court in Gurpreet Singh v. Chatur Bhuj Goel, AIR 1988 SC 400. The said decision

is in connection with Order 23 Rule 3 of CPC regarding compromise of the suit. In paragraph 10 of the said judgment, it has been held by the Apex Court that under Rule 3 of Order 23 of CPC, when a claim in a suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them. In paragraph 10, it has been held as under :-

" ... ...

10. Under R.3 as it now stands, when a claim in suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them. To constitute an adjustment, the agreement or compromise must itself be capable of being embodied in a decree. When the parties enter into a compromise during the hearing of a suit or appeal there is no reason why the requirement that the compromise should be reduced in writing in the form of an instrument signed by the parties should be dispensed with. The court must therefore insist upon the parties to reduce the terms into writing.

... ..."

13. Considering the matter from the aforesaid angle, in my view, the trial court is absolutely justified in not recording compromise under Order 23 Rule 3 of CPC, since the plaintiff has not shown willingness to abide by the said compromise by accepting the Award of the Arbitrators for the purpose of settling its claim and since the plaintiff has not settled or compromised the dispute by accepting the Award of the Arbitrators, the Court is not bound to pass a consent decree as provided under Order 23 Rule 3 of CPC. The trial court, therefore, cannot be said to have committed any error of law or of jurisdiction while rejecting the said application submitted by the defendant in the pending suit.

Mr.Dayani, however, submitted that, ultimately, if the Award of the Arbitrators is not to be considered as satisfaction of the suit or adjustment of the suit by way of compromise, then also, it should be held that the defendants have satisfied the claim of the plaintiff and for such satisfaction, it is not necessary that both the

sides should sign the consent terms, as, satisfaction of the claim has nothing to do with the compromise of the suit. However, I am not in a position to accept the said submission of Mr.Dayani for the simple reason that it is the case of the defendants that the suit between the parties is settled by virtue of the Award of the Arbitrators and if that be so, naturally, the proviso to Section 47 of the Arbitration Act, 1940 will come into picture and, therefore, it is not necessary to examine about the second part of Order 23 about the satisfaction of the claim of the plaintiff. However, Mr.Dayani submitted that by virtue of the Award of the Arbitrators and in view of the fact that, initially, the plaintiff also agreed to refer the matter to arbitration, now, the Award of the Arbitrators, in any case, can be said to be a satisfaction of the claim of the plaintiff or now, the suit of the plaintiff is in any way not maintainable and that the suit is now required to be dismissed by virtue of the subsequent event of the Award of the Arbitrators, which, according to Mr.Dayani, the plaintiff has accepted.

Mr.Vyas, learned Advocate for the Plaintiff, however, submitted that the application of the defendants before the trial court is not on this point. He submitted that whether the Award of the Arbitrators can be taken as a defence to a suit is a different thing altogether, for which the defendants are required to plead their case by appropriate pleadings before the trial court. Mr.Vyas submitted that even the suit of the plaintiff is not barred and is still maintainable in spite of the Award of the Arbitrators, as, according to Mr.Vyas, the Award of the Arbitrators is not legal. However, so far as the aforesaid aspect is concerned, it is for the defendants to take appropriate stand before the trial court in the pending suit. This Court is not required to decide this point as this revision is confined only in connection with the recording of the compromise as provided in Order 23 Rule 3 of the Code of Civil Procedure. Whether, the defendants can defend the suit of the plaintiff, on the ground that the Award of the Arbitrators, can be said to be a satisfaction of the claim of the plaintiff in the suit, or, whether, now, the suit of the plaintiff is in any way not maintainable, and, whether the suit is now required to be dismissed by virtue of the subsequent event of the Award of the Arbitrators, are all questions required to be examined by the trial court, after appreciating the evidence on record.

14. Mr.Dayani, at this stage, submitted that the

defendants would like to amend the written statement by incorporating the above points in the written statement for the purpose of defending the suit, with a request that the suit is required to be dismissed in view of the fact that the plaintiff has accepted the Award of the Arbitrators. However, this Court is not required to examine this point. If any such application is made before the trial court in this connection, either for the purpose of amending the written statement, or for raising all these points, it is for the trial court to decide the same in accordance with law after hearing both the sides. Whether such an Award can be taken into consideration in a pending suit is also required to be decided by the trial court in case any such argument is raised by the defendants before the trial court. On this point, at this stage, this Court has not expressed any opinion and it is for the trial court to decide the said point in case the same is canvased before the trial court in the pending suit. It is needless to say that if any such point is canvassed, it is for the trial court to decide the same in accordance with law.

No other points, except what are dealt with by me in the present order, were argued by both the sides.

So far as the present Civil Revision Application is concerned, the order of the trial court is required to be sustained in view of the reasoning given by me in this order. Under the circumstances, the revision application is dismissed. Rule is discharged. Interim relief stands vacated. No order as to costs.

At this stage, Mr.Dayani submitted that, during the pendency of the revision application, in view of the interim relief granted by this Court, the proceedings before the trial court were stayed. He has requested that the petitioners would like to approach the Honourable Supreme Court against this judgment and, therefore, the said interim relief may be continued for some time.

Mr.Vyas, on the other hand, submitted that the suit of 1983 is still pending and large amount of public fund is involved in the suit and, therefore, in his view, this Court should give appropriate direction to the trial court to complete the suit immediately as more than two decades have passed.

However, considering the fact that this Court has, at the time of admitting the revision, stayed the proceedings before the trial court and since the petitioners are desirous of approaching the Honourable

Supreme Court, in the facts and circumstances of the case, the stay of the proceedings, which is in existence as on today, is ordered to be continued for a period of one month from today. In case the petitioners do not obtain any order from the Honourable Supreme Court, the trial court shall thereafter proceed with the suit and may complete the suit at the earliest, latest by 31st December, 2004, as the old suit of 1983 is still pending.

15th April, 2004 (P.B. Majmudar, J.)

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(apj)